IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO.2 OF 2007
(Reference made by the Ad-hoc Sessions Judge Palghar)

The State of Maharashtra
(Through Manikpur Police
Station, Taluka Vasai,
District Thane) .. Appellant
(Orig.Complainant)

V/s

1. Dilip Premnarayan Tiwari
   Age 25 years,
   R/o Room No.444, Khatrinagar,
   Khairpada, Waliv, Taluka Vasai

2. Sunil Ramashray Yadav
   Age 20 years,
   R/o Waliv, Near Marathi School,
   Taluka Vasai, District Thane

3. Manoj Tulshi Paswan
   Age 22 years .. Respondents
   (Orig.Accused Nos.1 to 3)

WITH
CRIMINAL APPEAL NO.1086 OF 2006
(By original Accused Nos.1 & 3)

1. Dilip Premnarayan Tiwari &
2. Manoj Tulsi Paswan .. Appellants

V/s

The State of Maharashtra .. Respondent

WITH
CRIMINAL APPEAL NO.156 OF 2007
(By original Accused No.2)

Sunil Ramashray Yadav .. Appellant

V/s

State of Maharashtra .. Respondent

Mr.S.R.Borulkar, Public Prosecutor with Mr.A.R.Patil (APP) for the State.

Mr.Ramakant Patil Sr.Counsel with Mr.Shivraj Patil for Respondent-Accused No.1 in Confirmation Case No.2/2007 (and for Appellant No.1 in Appeal No.1086/2006).

Mr.S.N.Raj with Mr.S.L.Shukla for Respondent-Accused

No.2 in Confirmation Case No.2/2007 (and for the Appellant in Appeal No.156/2007).

Mr.Sandesh D.Patil for Accused No.3 in Confirmation Case No.2/2007 (and for Appellant No.2 in Appeal No.1086/2006)

CORAM : DR.S.RADHAKRISHNAN, & SMT.R.S.DALVI, JJ.

DATE OF RESERVING JUDGMENT : 27th August, 2007.
DATE OF PRONOUNCEMENT OF JUDGMENT : 1st November, 2007.

JUDGMENT: (Per Dr.S.Radhakrishnan, J)

1. The above confirmation case has been filed by the State of Maharashtra seeking confirmation of death penalty imposed upon the original Accused Nos.1 to 3 by the Additional Sessions Judge, Palghar, by his judgment and order dated 8th September, 2006 for the offence punishable under Section 302 read with Sectin 34 of the Indian Penal Code. Over and above, the accused have also been convicted for 10 years Rigorous Imprisonment and a fine of Rs.5000/- each for the offence punishable under Section 307 r/w 34 of the Indian Penal Code. In addition the accused have been convicted for 3 years Rigorous Imprisonment and a fine of Rs.1000/- each for the offence punishable under Section 452 r/w 34 of the Indian Penal Code.

2. Original Accused Nos.1 & 3 have challenged the above judgment and sentence by their Appeal Nos.1086/2006, and the original Accused No.2 has separately filed an Appeal No.156/2007 challenging the same.

3. The brief facts are that one Prabhu and Sushma fell in love and got married and therefter they were staying with the parents of Prabhu. Prabhu belonged to a very low caste "Ezhava" from the State of Kerala whereas Sushma belonged to an upper caste of "Brahmin" from the State of Uttar Pradesh. Both the families of Prabhu and Sushma were staying at Khatrinagar, Khairpada, Waliv, Dist.Palghar. It appears that the family of Sushma were very much opposed to the said marriage and that there were a number of threats from the family of Sushma. The marriage between Sushma and Prabhu had taken place on 29th October, 2003 before the Registrar of Marriages, Bandra, Mumbai. Original Accused No.1 - Dilip Tiwari is the brother of Sushma and the original Accused Nos.2 & 3, viz.Sunil Yadav & Manoj Paswan are the friends of original Accused No.1-Dilip Tiwari.

4. It is the case of the prosecution that 5 to 6 years prior to the incident, Sushma and Prabhu developed intimacy with each other and started meeting frequently to each other, and the deceased Bachhu @ Abhayraj who was residing near the house of Tiwari family was acting as a messenger to exchange messages between the Prabhu and Sushma. After some days, when the accused Dilip and his mother Tulsidevi learnt about the love affairs between Sushma and Prabhu and that Bachhu was acting as a messenger, they threatened him not to enter their house. It is the case of the prosecution that on one

occasion accused Tulsi (mother of Dilip) had seen Sushma (her daughter) talking with Prabhu and on that count Accused Dilip had assaulted Sushma with kicks and fist blows, and had threatened to kill both Sushma and her lover Prabhu if they were to marry each other. Thus there was a strong opposition from Tiwari family to the love affair and the love marriage between Prabhu & Sushma, being an intercaste marriage. It is the further case of the prosecution that on 29th October, 2003 Sushma married with Prabhu in Bandra Court and at that time the relatives of Prabhu alone had attended that marriage and nobody from Tiwari family or their relatives were present. After the marriage Sushma started residing with Prabhu (Nochil family), and since last one year prior to the incident, Accused Manoj Paswan was residing alongwith Tiwari. Kalpana who is the elder sister of Sushma, is married and residing in District Kanpur. As per the prosecution case, it appears that the Sushma continued her education even after her marriage with Prabhu at Vartak College, Vasai. Accused Tulsi had once met Sushma in Vartak College and asked her to leave husband (Prabhu) and had told Sushma that her second marriage will be performed in Uttar Pradesh. Sushma had denied that proposal. It appears that 10 to 15 days prior to the incident Sushma’s sister Kalpana had tried to contact Sushma on phone and asked her to meet her outside the house, however, that phone was attended by Sushma’s mother-in-law Indira (Prabhu’s

mother), and the Indira had asked Kalpana to come to thier house to meet Sushma. As per the prosecution's case on 8th May, 2004 Kalpana had again contacted Sushma on phone and thereafter met her in the College. Kalpana had told Sushma that her husband (Prabhu) was not smart and was not earning anything and further suggested Sushma to accompany her to their home town in Uttar Pradesh, where she had selected one youth serving in Air Force and that the Sushma should marry him. It appears that the Sushma had refused for that proposal and at that time the Sushma was pregnant. Even the Accused No.1 Dilip had also met Sushma once and had asked her to leave the house of her husband and stay with Tiwari family. Dilip had also threatened to kill her and the Nochil family (Prabhu's family), whereupon, the Sushma had suggested Prabhu to lodge a complaint in the Police Station about all such threats, but the Prabhu had suggested Sushma that Dilip and others are her relatives and everything will be alright by the passage of time. Thereafter, due to threats from the Accused Dilip, Sushma had suggested Prabhu that they should go to their home town in Kerala, however, Prabhu suggested to stay in the house of his relative at Andheri and accordingly Sushma was shifted to the house of Shashindran (relative of prabhu - husband of Prabhu's mother's sister). Shashindran and Balan reside adjacent to each other at Andheri, and Prabhu's mother Indira and the wives of Shashindran & Balan are the real sisters, and Bijit was

son of Balan.

5. On the night between 16th to 17th May, 2004 it is the case of the prosecution that the deceased Krishnan Nochil (father of deceased Prabhu), deceased Prabhu, deceased Bijit, witness Deepa (Prabu's sister) and Indira (Prabhu's mother) were sleeping in their house at Khairpada Waliv. At about 1.15 a.m. someone knocked the back side door of their house and when deceased Krishnan Nochil opened the door, Accused Dilip, Manoj, Sunil and one more person entered the house. Dilip and Manoj assualted Krishnan with knife over the chest, stomach, and when the Prabhu rushed to save his father Krishnan, Accused Dilip & Majoj also inflicted blows on Prabhu with knife over his stomach and chest. Dilip thereafter had asked accused Sunil and the unknown person to take Prabhu out of the house and kill him, and when Deepa started proceeding ahead to save her brother, Accused Dilip & Manoj armed with knife rushed towards her. At that time Bijit came there and he caught hold of Accused Manoj and urged him not to assault. On that accused Manoj inflicted blows with knife over the hand, chest, cheek of Bijit as a result of which Bijit fell down. As per the prosecution's case, the accused Dilip & Manoj thereafter came near Deepa and inflicted blows with knife over her face and body, and when Deepa fell down, accused Dilip & Manoj thereafter assaulted Indira (Prabhu's mother) with knife. At that time, accusd

Sunil who had taken out Prabhu, came back in that room and inflicted knife blows over the neck of Abhayraj @ Bachhu. Abhayraj immediately ran outside the house whereupon Accused Sunil chased him armed with the knife. Accused Dilip & Manoj therefter left the house and while leaving accused Manoj had dropped the knife in that room. It is the case of the prosecution that about 10 to 15 minutes thereafter, Deepa contacted Balan on phone and informed him the incident that accused Dilip, Manoj, Sunil and one more person had assaulted with knife to the family members. At the same time Indira (mother of Prabhu) went towards the front door. She opened the door and shouted "Bachav Bachav", but nobody came to their rescue. Prabhu who was lying in the injured condition in front of the said door was calling Indira as "Mammi Mammi". It is the case of the prosecution that the Head Constable Shri.Bhosale who was on bandobast duty at check post of Sativali Khind rushed to the spot upon being informed, and he also sent message to Manikpur Police Station to sent one Mobile Van. He saw Prabhu lying injured in front of door on the road, Indira lying injured near him, and also saw dead bodies of Bijit and Krishnan inside the house and Deepa lying injured. Shri.Bhosale then brought one tempo and sent injured Deepa, Indira and Prabhu to P.H.C.Navghar. At that time Prabhu’s relatives Shashindran, Balan and his wife who had reached the spot of incident at Khairpada Waliv they also noticed that Krishnan and Bijit were

dead. They also learnt that the injured were taken to Government Dispensary at Navghar. Shashindran and Balan then went to Navghar, and thereafter all the injured persons were taken to Bhagvati Hospital as they were very serious. Deepa and Indira were not in a condition to speak, however, Prabhu had disclosed to Shashindran that Sushma's brother Dilip, Manoj, Sunil and one more person had inflicted knife blows over the family members including him. As per the prosecution's case Prabhu succumbed to the injuries in the Bhagvati Hospital. As per the case of the prosecution, at about 5.00 a.m. Balan (relative of Prabhu) came to the Police Station and lodged a complaint about this incident. Accordingly, C.R.No.I-144/04 was registered at about 5.30 a.m. for the offences punishable under Sections 302, 307, 452, 34 of the Indian Penal Code. Thereafter the P.S.I. Shri.Barve had prepared the inquest panchanama of the dead bodies of Krishnan and Bijit at 6.00 a.m., he had also prepared the inquest panchanama of the dead body of Abhayraj who was lying near the K.T.Maidan and thereafter all the three dead bodies were sent to postmortem examination. Thereafter the investigating Officer had prepared the spot panchanama in presence of the panchas and seized one blood stained handkerchif, one blood-stained iron knife and also collected the sample of blood stains lying on the floor with the help of cotton swab.

6. On 18.5.200 PSI Shri.Barve recorded the statement of injured Deepa at the Bhagwati Hospital, and on 27.5.2004 statement of Sushma came to be recorded. Thereafter, Accused Dilip was arrested on 29.5.2004 from Uttar Pradesh, and his statement came to be recorded under panchanama. Thereafter one knife, pant and shirt having blood stains were recovered at the instance of accused Dilip. Statement of injured Indira was recorded on 2.6.2004 in the hospital. Assused Sunil was arrested on 2.6.2004 and as per his disclosure statement made on 5.6.2004 memorandum panchanama was prepared and one knife and blood stained clothes were seized under panchanama at his instance. Accused Manoj was arrested on 22.6.2004. Accused Premnarayan (father of Dilip) and Tulsidevi were arrested on 25.6.2004, and thus after completion of investigation, the chargesheet was filed in the Court of J.M.F.C. at Vasai for the offences punishable under Sections 302, 307, 452, 34 and 120-B of the Indian Penal Code, and said offences u/s.302, 307 of the I.P.C. being triable exclusively by the Court of Sessions, the case was committed to the Sessions Court for further trial. It is the case of the prosecution that all the accused pleaded not guilty to the charge and claimed trial. All the accused had taken a defence that they have been falsely implicated in this case. The prosecution has examined 14 witnesses, while Accused Sunil has examined 2 defence witnesses.

7. Mr.Borulkar, the learned Public Prosecutor for the State argued for confirmation of death penalty on all the three accused. Mr.Borulkar, the learned Public Prosecutor, at the outset, very fairly submitted that there were two mitigating circumstances, namely age of the accused, and no criminal antecedents. However, Mr.Borulkar pointed out that the age of the accused is not a mitigating circumstance as has been held by the Supreme Court. Mr.Borulkar, pointed out the following aggravating circumstances, justifying imposition of death penalty on the accused persons:-

(a) Helpless victims

(b) Victims totally unarmed

(c) Victims woken up from sleep at midnight

(d) Manner of inflicting injuries, 20-30 serious injuries on each of the deceased, whereas even a single injury would have been sufficient to kill, shows the barbarous attitude.

(e) Attacking ruthlessly six persons, Deepa & Indira were let off presumed to be dead, seeking to wipe off the entire family.

(f) Attacked on every vital organ.

(g) Young boy Bijit was brutally assaulted.

(h) Not only Prabhu, even the messenger boy Abhayraj was brutally assaulted.

(i) The time chosen was past midnight hence clearly premeditated.

(j) Assault on lower caste based on caste hatred

(k) Marriage took place on 29.10.2003 and the assault was on 17.5.2004, i.e.after a lapse of seven months. As Dilip was totally opposed to the marriage, the above attack was highly pre-meditated and not at the heat of the moment.

8. The learned Public Prosecutor referred to the following judgments of the Supreme Court and our Court, dealing with the principles regarding the imposition of death penalty:-

Dhananjoy Chatterjee Alias Dhana V/s.State of W.B.- 1994 SCC (Cri) 358, wherein the observations in Paragraph Nos.13 to 16 are relevant, which read as under:-

"13. We have given our anxious consideration to the question of sentence keeping in view the changed legislative policy which is patent from section 354(3) CrP.C. We have also considered the

observations of this Court in Bachan Singh case- **Bachan Singh V/s.State of Punjab - (1980) 2 SCC 684: 1980 SCC (Cri) 580."**

"14. In recent years, the rising crime rate - particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime, does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration."

"15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

"16. The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous typy of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. If the security guards behave in this manner who will guard the guards? The faith of

the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts whiile considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the secury guard certainly makes this case a "rarest of rare" cases which calls for no punishment other than the capital punishment and we acordingly confirm the sentence of death imposed upon the appellant for the offence under section 302 IPC. The order of sentence imposed on the appellant by the courts below for offences under Sections 376 and 380 IPC are also confirmed along with the directions relating thereto as in the event of the execution of the appellant, those sentences would only remain of academic interest. This appeal fails and is hereby dismissed."

Ronny alias Ronald James Alwaris and Others V/s.State of Maharashtra - (1998) 3 SCC 625, wherein paragraph No.47 reads as under:-

"47. Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstanes in which they were committeed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 (sic 27) years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a

case like this it is not possible to say as to whose case falls within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is awarded by the courts below under Sectin 302 read with Section 34 from death to life imprisonment. The sentences for the offences for which the appellants are convicted, except under Section 376(2) (g) IPC, shall run concurrently; they shall serve sentence under section 376(2)(g) IPC consecutively, after serving sentence for the other offences."

Ediga Anamma V/s.State of Andhra Pradesh - AIR 1974 Supreme Court 799, wherein the relevant paragraph No.26 reads as under:-

"26. Let us crystalise the positive indicators against death sentence under Indian Law currently. Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent

creed and accepting the trend against the extreme and irrevocable penalty of putting out life."

State of U.P.V/s.Dharmendra Singh and Another - (1999) 8 SCC 325, wherein, Paragraph No.22 of the judgment reads as under:-

"22. The prosecution in this case, as accepted by the two courts below, has established the fact that Dharmendra nursed a grudge against the complainant for having purchased the family property including the residential part against his desire to own the same. The prosecution has also established that Narendra, though an educated person who at the time of the incident, was pursuing his LLB Course had been entertaining a lust towards Reeta and in furterance of this desire had been teasing her and also a few days prior to the incident, had tried to molest her consequent to which, upon a complaint made by Reeta, the complainant and his nephew had assaulted Narendra. This case of the prosecution shows that these two persons in furtherance of their diabolic motive conspired to teach a lesson to the complainant by killing such of those members of the family who were vulnerable and helpless. This is clear from the timing of the attack which was when other able members of the family were away from the house and only the aged and the weak remained alone in the house. Also the fact that they solicited the help of four of their friends (other accused) shows that the intention was to kill as many members of the complainant family as possible, irrespective of the fact whether the victims were the cause of their vengeance or not. The ghastly manner of attack on the deceased, which is evident from the post mortem report shows that the act in question was premeditated, senseless, dastardly and beyond all human reasoning inasmuch as 53 wounds were inflicted on the 5 deceased persons; each one suffering at least 10 wounds on an average. The ataacks were aimed at such parts of the body in succession where even a single stab would have, in the ordinary course, sufficed to cause death. The denuding of the lower part of the body of Reeta showed an element of perversity which could be attributed to the mind of frustrated men who totally lacked human sensitivity. A holistic examination of the material on record shows that the barbaric offence in question could only be termed as a ‘rarest of the rare’ case."

Lehna V/s.State of Haryana - (2002) 3 SCC 76, wherein, the observations of the Supreme Court in paragraph No.20 to 23 are relevant, which read as under:-

> "20. In **Machhi Singh - 1983 (3) SCC 470** and **Bachan Singh - 1980 (2) SCC 684** cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated."
>
> "21. In Machhi Singh case it was observed: (SCC p.489, para 39) -
>
> The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:
>
> a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? "
>
> "22. The following guidelines which emerge from Bachan Singh case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises : (SCC p.489, para 38)
>
> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstancs of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

"23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g.murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

9. Mr.Borulkar thereafter referred to and relied upon

the Division Bench judgment of this Court in the case of **The State of Maharashtra V/s. Assis Domnic Warawale & Anr.- Confirmatin Case No.5 of 2005 in Sessions Case No.112 of 2004 dated 9th August, 2006**, and the relevant paragraph Nos.155 & 156 of the said judgment read as under:

> "155. The age of the accused becomes irrelevant in the context of this case, because they had entered a conspiracy. It was not that the offence was committed by them at the spur of the moment. Two murders committed by them in sequence to achieve their objective i.e. to rob old lady of her valuables do reveal that the act of the accused is a menace to the society and so called argument about reformation is only to gain sympathy of the court and nothing more. Therefore, in the circumstances, viz. the accused belonging to the middle class respectable families and lack of any criminal record against them are not at all mitigating circumstances."
>
> "156. Mr.Memon tried to contend that it is not certain as to who out of the two accused hanged the child. This arguament is totally futile because these accused i.e. accused Nos.1 and 2 had entered the bedroom and the manner in which that diabolic act of hanging the child was executed, clearly shows that more than one person was required to participate in hanging the child to the ceiling fan with the help of telephone cord. Mr.Menon also tried to contend that even the evidence of P.W.18 Gienda Lobo, shows that actual blows upon Leticia were inflicated by two juvenile boys and none of these accused had any role to play. We are not at all in agreement with this argument when all of them entered the house with common intention to rob and in sequence thereof Leticia was murdered and the child was killed, these accused i.e.accused Nos.1 and 2 must be held to share the common intention in doing this entire act i.e. robbery and murders of Leticia and infant child Mast.Dylon Lobo. Therefore considering the mitigating and aggravating circumstances, we hold that there are absolutely no circumstances to justify imposition of sentence lesser than the death sentence."

10. Mr.Borulkar, the learned Public Prosecutor thereafter referred to and relied upon the Supreme Court

Judgment in the case of **Shivu and Another V/s.Registrar General, High Court of Karnataka and Another - (2007) 4 SCC 713,** and the relevant paragraph Nos.22 and 23 of the said judgment read as under:-

"22. In **Machhi Singh - 1983 (3) SCC 470** case it was observed: (SCC pp.471-72)

The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:

a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? "

. The following guidelines which emerge from **Bachan Singh - 1980 (2) SCC 684** case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises : (SCC p.489, para 38)

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstancs of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and

in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

. In rarest of rare cases when collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g.murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of ‘bride burning’ or ‘dowry deaths’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare case, the circumstances of the case are such

that death sentence is warranted, the court would proceed to do so."

"23. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilised society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the courtroom after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis."

11. **Applying the** above principles, Mr.Borulkar contended that the above case clearly come within the purview of "rare and rarest case" entailing death penalty.

12. Mr.Ramakant Patil, the learned Counsel appearing on behalf of Dilip Tiwari, the original Accused No.1, made the following submissions, challenging the said conviction and sentence:-

a) Mr.Ramakant Patil has submitted that so for as the Accused No.1 - Dilip Tiwari is concerned, there are no criminal antecedents against him. The learned Counsel Mr.Ramakant Patil has further submitted that the Accused No.1 had not even completed 25 years of age at the time when the offence was committed, and that he

is an unmarried person, and this is not a rare and rarest case, hence death penalty ought not to be confirmed.

b) The learned Counsel for Accused No.1 has further submitted that so far as FIR is concerned, there was two hours delay in lodging the FIR. According to him, the information was received by the police especially Police Head Constable Shashikant Bhosale at 3.30 a.m.and the FIR was lodged at 5.30 a.m., and as such, the FIR is nothing but a concocted story. Mr.Ramakant Patil has submitted that the Balan was not an eye witness of the offence, but he visited the scene of offence later on. According to him, the said Balan with collusion of Shashindran and P.S.I.Mr.Barve have concocted the FIR.

c) According to Mr.Ramakant Patil, the Balan's statement should have been treated as a statement under Section 161 of the Code of Criminal Procedure Code and not as an FIR.

d) The learned Counsel Mr.Ramakant Patil has further submitted that so far as P.W.No.10-Shashikant Bhosale, Police Head Constable is concerned, he was a material witness who had actually received the first information of the incident while on duty at Check Post at Sativli Khind, and therefore, P.S.I.Mr.Barve

should have recorded the Bhosale's statement as FIR. Mr.Patil has vehemently submitted that the delay in lodging the FIR was not explained satisfactorily.

e) The learned Counsel Mr.Ramakant Patil has contended that the body of Abhayraj was found three hundred feet away from the house and as such he was not part of the sequence of events. According to the learned Counsel there was no overt act by Dilip against Abhayraj.

f) Mr.Ramakant Patil has further submitted that deceased Prabhu's body was found outside the house, and as such, the unknown persons could have caused fatal injury on Prabhu outside the house and therefore the Accused persons should not be held responsible for his murder.

g) Mr.Ramakant Patil submitted that the buffaloes of Krishnan must have damaged some fields, hence some unknown persons must have attacked Krishnan, Prabhu etc.

. Under the aforesaid facts and circumstances, Mr.Ramakant Patil, the learned Counsel for accused Dilip Tiwari prays for his acquittal.

13. Mr.Sandesh Patil, the learned Counsel appearing on behalf of Manoj Paswan, original Accused No.3 challenges

the conviction and sentence on the following grounds.

a) According to Mr.Sandesh Patil, the acquittal of Accused Nos.4 & 5 raises doubt about the entire case, especially the conviction of original Accused No.3 - Manoj Paswan. He has submitted that what is needed in this case is a very careful examination of the evidence of the case. Attacking the issue of FIR, Mr.Sandesh Patil has stated that the FIR was lodged belatedly and therefore such a delayed FIR is not believable. He has raised the question as to which is the actual FIR, and as to who was the actual informant. According to him the entire evidence in this case is contrary to the FIR. He has further submitted that the FIR is hit by Section 161 of the Code of Criminal Procedure, and there is a deliberate suppression of real informant of the offence. So far as Accused Manoj is concerned, the learned Counsel Mr.Sandesh Patil has vehemently submitted that no identification parade was conducted for the said accused. The learned Counsel has further submitted that there is material contradiction in the evidence of two eye witnesses and there are several omissions in their police statements. According to him even the medical evidence does not corroborate the evidence of other witnesses, and that the same panch witness was used for four different panchanamas.

b) The learned Counsel Mr.Sandesh Patil has further submitted that so far as P.W.No.2 -Shashindran is concerned, there are various improvements, contradictions and omissions in his deposition, as recorded in paragraph No.17. According to him the evidence deposed by P.W.No.2-Shashindran is not at all reliable, and the benefit of doubt should be given to the Accused Manoj Paswan in this case. The learned Counsel pointed out that the P.W.No.2 in his cross examination has deposed that he had not stated before the police that Sushma’s brother Dilip, Manoj, Sunil and one more person inflicted blows with knife, but he had just stated that the Accused persons had inflicted blows over the family members of Prabhu. That is to say there is an improvement of "knife". The learned Counsel further pointed out that the P.W.No.2 has also denied of having stated before the police that Prabhu had told him that Manoj and Sunil were Dilip’s friend.

c) Assailing on the evidence of P.W.No.4- Deepa, the learned Counsel Mr.Sandesh Patil has vehemently submitted that her evidence is totally unreliable. According to him, if Deepa was conscious from the time of incident till going to Bhagwati Hospital, then she could have lodged a complaint. According to the learned Counsel it was stated by P.W.No.4 - Deepa that there were various injuries on different parts of her body, however her blood-stained clothes were never

seized. The learned Counsel has further submitted that though Deepa had stated that she herself as well as Bijit were sleeping in the house, however, witness Indira does not name Bijit. According to him though Deepa stated Manoj had inflicted blows over Bijit, witness Indira however does not mention name of Bijit. The learned Counsel Mr.Sandesh Patil has strongly contended that the time as to when witness Deepa became unconscious is a very crucial point. According to him if Deepa herself had stated that she regained consciousness on next day, then her deposition about narrating the incident to Balan appears to be doubtful and unreliable. According to him the time as to when she was unconscious is not clear. The learned Counsel has further submitted that if there were stitches on Deepa's lips, then her deposition that her statement was recorded by the police appears to be doubtful. The learned Counsel further submitted that Deepa does not say in police statement that Manoj and Sunil were Dilip's friends. According to him, there was delay in recording Deepa's statement and that whether she could talk or not is also doubtful. The learned Counsel has stated that Deep's evidence was unreliable and was not trustworthy.

d). Mr.Sandesh Patil, the learned Counsel for the original Accused No.3 - Manoj Paswan thereafter took us through the evidence deposed by P.W.No.8-Indira and

has submitted that in Indira's deposition also there are various contradictions and improvements. The learned Counsel has submitted that in the evidence of Indira there was no mention of Bijit being there, and that she no where says that Deepa had telephoned Balan. According to him, there is no reference of knives in her statement and therefore there is material improvement with regrd to knives.

e) Mr.Sandesh Patil, the learned Counsel appearing on bahalf of original Accused No.3- Manoj Paswan has further submitted that there is no case motive involved. According to him, there was no positive and clear evidence as to the motive behind the offence, and that the accused was falsely implicated in the case. According to him the person who actually informed the incident to Police Head Constable Bhosale was not examined. Even his identity was not disclosed and his statement was not recorded, and therefore the case appears to be entirely concocted by the prosecution.

f) The learned Counsel further sought to point out the contradictions and omissions in the evidence of Deepa. In her cross-examination, in paragraph No.29, the witness Deepa has specifically admitted that she had not stated in her statement before the Police that all the four accused persons were armed with knives. As

stated in the said paragraph No.29, she has also admitted that she had not stated before the Police that the age of Bijit was 13 years. Even the description of knife was not stated before the Police. According to the learned Counsel the deposition of witness Deepa in paragraph No.34 that she had stated before the police that she knew Accused Sunil and Manoj as Dilip’s friends, is an improvement.

g) The learned Counsel Mr.Sandesh Patil has thereafter submitted that no arrest panchnama was drawn so far as accused Manoj Paswan was concerned. According to the learned Counsel the Accused Manoj’s clothes were not sent to Chemical Analyser though panchanama was drawn, and even there was no report of the Chemical Analyser with regard to the knife. According to him the panchanama of the clothes was also not produced.

. Under the aforesaid facts and circumstances, Mr.Sandesh Patil prays for acquittal of the accused Manoj Paswan.

14. Mr.Raj, the learned Counsel appearing on behalf of Sunil Yadav, original Accused No.2 challenges the conviction and sentence as under:-

a) Mr.Raj, the learned Counsel for accused Sunil Yadav has submitted that the omission of the names Manoj

Paswan and Sunil Yadav by Balan in the FIR tantamounts to contradiction. In support of his submissions, he referred to the judgment of the Hon'ble Supreme Court in the case of **Juwarsingh s/o Bheraji & Others V/s.State of M.P. - 1980 (Supp) SCC 417,** wherein paragraph No.6 reads as under:-

> "6. In regard to the seven persons whose names were not mentioned in the first information report, PW 1 was unable to explain why she failed to mention their names in the report. She frankly stated that she cannot state the reason as to why their names were not mentioned. We think that these seven persons are entitled to the benefit of doubt and should be acquitted."

15. Mr.Raj, the learned Counsel for Accused Sunil Yadav also referred to and relied upon another judgment of the Hon'ble Supreme Court in the case of **A.R.Singh V/s.Govt.of Manipur - (1976) 3 SCC 465**, wherein the observations of the Supreme Court in paragraph No.7 of the judgment are relevant, which read as under:-

> "7. It will be remembered that it was Dorendro Singh who went to Ibotan Singh (PW 1) to inform him about the incident. By tthat time, he knew the name of the assailant. The Sessions Judge, cannot therefore be said to be unreasonable in taking the view that if the name of the appellant had really been disclosed by Sanajoba Singh, and Dorendro Singh knew it, he would have mentioned it to Ibotan Singh. Ibotan singh himself reached the hospital as soon as he learnt about the incident from Dorendro Singh, and we have it from sanjoba Singh that Ibotan Singh and others had come to him soon after, near the emergency room. There could be no reason why Sanjoba Singh would not have told Ibotan Singh about the name of the person who had inflicted the fatal injuries on the deceased, and the Sessions Judge cannot be said to be unreasonable if he attached importance to the

> fact that, even so, the name of the appellant was significantly omitted from the first information report which was lodged by Ibotan Singh soon after, and, on the other hand, it was stated that the offence had been committed by somebody and the culprits may be arrested and dealt with."

16. Mr.Raj, the learned Counsel thereafter submitted that the motive, which is an essential element in a crime, was not established clearly against the Accused Sunil Yadav. Referring to paragraph No.5 of the examination in chief of Balan-PW No.1, the learned Counsel Mr.Raj appearing for the accused Sunil Yadav has sought to contend that Deepa who had informed Balan about the incident on 17.5.2004 at about 1.15 a.m. on phone had only stated that Sushma's brother Dilip and his three colleagues were inflicting blows with knife to the family members, and she did not mention the names of those three colleagues to Balan. Referring to the deposition of P.W.No.2-Shashindran, especially paragraph No.10, the learned Counsel Mr.Raj has sought to contend that even Shashindran was not knowing accused Manoj & Sunil personally, but Prabhu had told him in the ambulance while going to the Bhagwati Hospital that they were Dilip's friends. Thereafter, the learned Counsel took us through the deposition of P.W.No.13 - PSI Mr.Barve, wherein in paragraph No.16 the said witness has deposed that P.W.No.4 -Deepa had not stated before him that she knew accused Sunil and Manoj as Dilip's friends, and that Deepa had not stated before him that Accused Sunil and unknown person took Prabhu out of the

room and killed him. Mr.Raj, the learned Counsel for accused Sunil Yadav has sought to submit that there was no involvement of Sunil Yadav in the offence and his name was not even mentioned by any of the members of Nochil Family (Prabhu's family).

17. In support of his submissions, Mr.Raj, the learned Counsel for Accused Sunil Yadav thereafter referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Yudhistir V/s.State of M.P. - (1971) 3 SCC 436**, wherein, the relevant observations of the Supreme Court in paragraph Nos.23, 24, 25 & 30, read as under:-

> "23. When confronted with these omissions in the police statements, P.Ws.1 and 6 stated before the Court that though they mentioned all the details about the crime to the police, the latter has not properly recorded their statements. But the Investigating Officer, P.W.17 has given evidence to the effect that he has recorded the staements of P.Ws.1 and 6 as given by them and that they did not mention anything about the part played by the appellants in the crime."
>
> "24. Mr.Shroff, learned Counsel for the State, has attempted to explain away these circumstances on the ground that they are only minor omissions which will not affect the credibility of their evidence given before the Court. We cannot accept this contention of the learned Counsel. We are of the opinion that these omissions, pointed out above, are not minor, but they are omissions of a very substantial nature, which affect the truth of the evidence given before the Court. On the earliest occasion these witnesses have omitted to refer to the decisive role stated to have been played by the appellants in the commission of murder. Therefore, the statement before the Court implicating appellants must, in the circumstances, be considered to be an improvement."
>
> "25. In fact the learned Sessions Judge has also

held that the evidence of P.Ws.1 and 6 to the effect that after coming out of the house of Bamdeo they had told the people assembled outside that all the four accused persons had killed Surajkunwar cannot be believed. Similarly, the learned Sessions Judge has also held that these two witnesses cannot be believed on the point that along with Bamdeo the appellants had also actively participated in causing the death of Surajkunwar."

"30. The High Court further, without any reference to these omissions and to the evidence given before the Court holds "that P.Ws.1 and 6 must have seen what transpired inside the room". Such a finding recorded by the High Court without reference to the various circumstanes, already adverted to by us, cannot but be characterised as anything but a guess work and cannot be treated as a finding arrived at after a consideration of the evidence. On such reasoning, as pointed out, the High Court has confirmed the conviction of the appellants. The approach made by the High Court is not at all justified and as such the conclusios arrived at by the High Court, as against the appellants, cannot be sustained."

18. Mr.Raj, the learned Counsel appearing on behalf of Accused Sunil Yadav has also referred to and relied upon the judgment of Supreme Court in the case of **State of Rajasthan V/s.Rajendra Singh - (1998) SCC (Cri) 1605**, wherein the relevant observations of the Supreme Court in paragraph No.7 are relevant, which read as under:-

"7. It was submitted by the learned Counsel for the State that as many as six witnesses were found injured and that would establish their presence at the place of the incident. In our opinion, this contention is of no help to the appellant because their evidence has not been discarded on the ground that they were not present. Their evidence was discarded because they were found not telling the truth before the Court. It was also submitted by the learned Counsel that the evidence of PWs.1 to 4 stood corroborated by two independent witnesses, namely Ramjilal and Jeevan Singh. PW 8 Ramjilal had stated that he had gone to the spot on hearing the sound of

a gunshot and tried to snatch away the gun from the respondent. But he was contradicted by his police statement wherein he had not stated anything regarding snatching of the gun. This omission on such a vital point has to be regarded as a contradiction and it creates a serious doubt about the truthfulness of his version. PW 9 Jeevan Singh had stated that he had also rushed to the spot on hearing the sould of a gunshot. He further stated that he had made an attempt to save Harveer and in doing so, he had received an injury. He had not so stated before the police. This also shows that this witness had made a material improvement before the Court in order to make his evidence acceptable."

19. Over and above, the learned Counsel Mr.Raj sought to contend that so far as Accused Sunil Yadav is concerned, there is no overt act attributed to him regarding the Nochil family. He even sought to contend that Deepa's evidence is not trustworthy. Referring to the deposition of P.W.No.14 - Kiran Digambar Gosavi, Additional S.P.State CID, Pune, (paragraph No.22), the learned Counsel Mr.Raj appearing for accused Sunil Yadav has sought to contend that, even the aforesaid witness Gosavi has deposed that P.W.No.8 Indira had not stated before him that accused Sunil Yadav was a friend of Accused Dilip. According to him the motive behind the crime was not established.

20. Referring to the statement of witness Deepa recorded by the police, the learned Counsel Mr.Raj has submitted that Deepa's deposition is not credible at all. The learned Counsel took us through the deposition of P.W.No.2 - Shashindran (paragraph No.4), and sought to contend that even in the deposition of aforesaid

witness Shashindran, there is no reference to the ‘knife’ being used in inflicting the blows. The learned Counsel has pointed out that the aforesaid witness Shashindran has stated that, Balan told him the information as received from Deepa on telephone, that Dilip, Manoj, Sunil and their associates had inflicted blows over the family mebers. According to the learned Counsel, there was no reference of infliction of ‘knife blows’ by Deepa in her information on telephone to Balan. Thus, according to him, omission of ‘knife’ is a favourable aspect to the Accused. Referring to paragraph No.10 of deposition of Shashindran in paragraph Nos.17 & 18 the learned Counsel Mr.Raj has contended that there are various serious contradictions and improvements about ‘knife-blows’ as well as ‘Dilip’s friends’, and as such, the deposition of Shashindran is also unreliable.

21. The learned Counsel thereafter took us through the deposition of P.W.No.3-Sushma, in paragraph No.13. The learned Counsel has submitted that, though the aforesaid witness Sushma in her deposition had stated that it was disclosed to her by Balan (in the house of Shashindran) that Balan received a phone call from Deepa informing that accused Dilip, Manoj, Sunil and one more person had assaulted Deepa and her family members with knife, in the FIR however the Balan does not say about disclosing details of Deepa’s conversation to them. In FIR, Balan

does not say about telling Sushma and Shashindran the details of the incident. The learned Counsel further submitted that in the Supplementary Statement recorded on 17.5.2007 there is a clear improvement about this, and therefore, its credibility is doubtful. According to the learned Counsel, the Balan & Shashindran do not even say in the police statement or in their evidence that they had narrated the conversation of Deepa to Sushma.

22. Thereafter, taking us through the evidence of Indira-P.W.No.8, the learned Counsel Mr.Raj appearing on behalf of Accused Sunil Yadav has submitted that Indira's evidence also cannot be relied upon. The learned Counsel further states that Sushma in her deposition recorded on 30.9.2005 (paragraph No.16) had clearly deposed that her mother-in-law Indira had lost her mental control and was under treatment of Dr.Paresh Pai. Referring to section 118 of the Evidence Act, Mr.Raj, the learned Cousnel has submitted that the Court was duty bound to ascertain the mental stability of the witness before deposing. According to him, neither the prosecution, nor the defence or Court verified whether she was competent to depose. The learned Counsel has further stated that in her police statement and deposition, there is no mention of Deepa's conversation to Balan. Referring to paragraph 10 of the deposition of Indira, the learned Counsel Mr.Raj has submitted that

Indira does not mention about knocking of door and 4 persons entering the house. She has stated that when she opened the door after hearing shouts she found her husband had already fallen down due to injuries, and Deepa had also fallen down due to injuries and that she was not sure about Deepa's physical condition and consciousness. The learned Counsel Mr.Raj has vehemently submitted the witness Indira has not stated anything about Deepa's telephone call to Balan. According to the learned Counsel, Indira found Deepa fallen down due to injuries and was unconscious at that time, and if that be so, then, there was no possibility of Deepa telephoning to Balan.

23. The learned Counsel Mr.Raj thereafter took us through the evidence of Investigating Officer being the P.W.No.14- Kiran Digambar Gosavi, Additional S.P., State CID, Pune, (paragraph No.18). The learned Counsel has submitted that the aforesaid Investigating Officer had verified the statement of one Dipa Yashwant Kakad which was recorded by PSI Mr.Barve, from which it was transpired that injured Indira had knocked the door of their house, and at that time, Indira was wearing maxi and there was profuse blood over her person. The learned Counsel has sought to contend that Dipa Yashwant Kakad ought to have been examined but the prosecution chose to examine only the interested witnesses and not independent witness.

24. Referring to paragraph No.26 of the judgment and the evidence of Investigating Officer P.W.No.14 in paragraph No.22, the learned Counsel Mr.Raj has submitted that there was improvement about ‘knife’, and that there was contradiction and improvement on material aspects. The learned Counsel has further submitted that there was undue delay in recording the statement of Indira under Section 161 of Cr.P.C. According to him Indira’s statement was recorded by the police on 2.6.2004 and thus there was 16 days’ delay. Thereafter referring to the Investigating Officer (P.W.No.14) Mr.Gosavi’s deposition, paragraph No.22 on page 215, the learned Counsel Mr.Raj has submitted that P.W.No.8-Indira had not stated before Investigating Officer that accused Sunil was the friend of accused Dilip. The learned Counsel therefore submitted that there were improvements and contraditions with regard to the material aspects.

25. Referring to the deposition of Investigating Officer in paragraph No.5, Mr.Raj, the learned Counsel has pointed out that the police statement of witness Indira was recorded belatedly on 2.6.2004. According to him, though the I.O.has stated that earlier to 2.6.2004 witness Indira was not in a condition to give her statement, everyday’s delay has not been properly explained. The learned Counsel has further submitted

that there is no arrest panchanama in any of the case.

26. Thereafter the learned Counsel Mr.Raj referred to the Rajendra's evidence (brother of Sunil).

27. Referring to paragraph 24 of the deposition of Mr.Gosavi, the Investigating Officer - P.W.No.14, the learned Counsel Mr.Raj has submitted that the Test Identification Parade was not conducted by the said Investigating Officer.

28. In support of his submissions, Mr.Raj, the learned Counsel has referred to and relied upon the Supreme Court judgment in the case of **Rambilas and Others V/s. State of M.P. - 1997 SCC (Cri) 1222**, wherein, the observations of the Supreme Court in paragraph Nos.5 & 6 are relevant, which read as under:-

"5. We have very carefully gone through the judgments of both the courts below and with respect we find that notwithstanding the concurrent judgments thereof we are unable to sustain the convictions of the appellants on any count. It is well settled that this Court would be slow to interfere with the findings of facts recorded by the courts below which are based on appreciation of evidence but we are of the considered view that the Sessions Court as well as the High Court have mechanically read the evidence of the eyewitnesses and totally ignored the well-known principle of appreciation of evidence. We have very carefully gone through the evidence of PW 2, PW 3, PW 5 and PW 6 who claimed to be the eyewitnesses. If we compare the evidence of these eyewitnesses it is immediately noticed that their evidence is just like a parrot telling what is taught. Even the omissions, contradictions and improvements are identical. The claim of these eyewitnesses is totally unbelievable

when they testified that they had gone to the place of occurrence. The distance between their houses and the place of the occurrence is said to be one furlong. It was night time and the only light available was that of the moon. A festival "Ganga Dashara" was being celebrated in the village and these witnesses claimed that they heard the noise of Marpeet by sticks and, therefore, they woke up. During the cromm-examination they tried to explain by saying that they were not fully asleep and, therefore, could hear the noise of marpeet. They claimed that they had not consumed any liquor. Their further claim was that when they went to the place of the occurrence they all had earlier met at a place which was in front of the house of Sukhnath (PW 5). The claim of Sukhnath was that he overheard the talk between other eyewitnesses and, therefore, he came out and went along with them to the place of the occurence. The claim made by these eyewitnesses in their examination in chief was that they had actually seen the assault on Deosharan by the appellants but during cross-examination they admitted that they did not see the actual assault as they were prevented from going to the place of the occurrence by the appellants. The talk between the appellants and these four eyewitnesses was again absolutely identical without adding a word "less" or "more". In addition to the above, the salient feature of their evidence is that after some time, they again went to the place of the occurrence but they could not see the appellants as well as the dead body. They searched for the appellants during the whole night. This claim of these eyewitnesses is difficult to accept because according to them, they had already been threatened by saying that if they made any noise they would meet the same fate like Deosharan. The assertion of these witnesses that they had gone to the place of the occurrence during that night appeared to us a cock and bull story. Another circumstance that weighed with us is that despite such a ghastly attack on Deosharan, none of them ever thought of going to the father of Deosharan to inform him about the incident. They also did not go to the police station during the same night to lodge the first information report. Furthermore, the story of these eyewitnesses as regards the assault on Deosharan is also not corroborated from the medical evidence. Dr.S.S.Pankera (PW 4) had noticed three external inuuries on the head and many small injuries on the whole chest, backside and both feet, knees and below the knees. Dr.S.S.Pankera further opined that the dead body was mutilated and there was a fracture on occipital portion and blood clot was present inside the skull. One has only to test this evidence on the touchstone of probability that when the five appellants were simultaneously attacking Deosharan with the sticks in their hands, of which the noise was heard from a

distance of one furlong, there ought to have been many more injuries on the dead body of Deosharan. After going throughthe evidence of these four star witnesses who constituted the backbone of the prosecution story, we are of the considered view that in all probabilities it was a blind murder."

"6. It is no doubt true that there was no motive for these eyewitnesses to implicate the appellants in the present crime. That by itself would not lend any foolproof assurance that their evidence is credible and trustworthy. It has also come on the record that because of the notorious character of Deosharan he had many enemies in and around the village and if that be so the probability of somebody else other than the appellants being the assailant cannot be ruled out. The courts below, in our opinion, had failed to read the evidence of these eyewitnesses in a proper perspective and had fallen into error in accepting their evidence as credible and truthful."

29. Mr.Raj, the learned Counsel appearing on behalf of Accused Sunil Yadav has submitted that absence of motive to falsely implicate by itself will not mean witness is truthful.

30. Mr.Raj, the learned Counsel has further submitted that in the FIR, the Balan does not mention anything about Abhayraj. Omission of "Abhayraj" in the FIR is a favourable aspect to the Accused. Mr.Raj submitted that the body of Abhayraj was found about three hundred feet away from the house of Krishnan, makes it doubtful whether the murder of Abhayraj took place within the house of Krishnan. Mr.Raj also raised a doubt as to when other neighbours did not wake up and came in, whereas Abhayraj did so.

31. Mr.Raj, the learned Counsel thereafter referred to the deposition of the Medical Officer Dr.Ashok

Pundlikrao Bhande being the P.W.No.6, who in paragraph No.12, has stated that such injuries caused to Abhayraj may be possible due to sword, sickle and knife. The learned Counsel thereafter took us through the post mortem report of Abhayraj, especially clause 17(3), wherein the injuries are shown as under:-

> "Incise wound over left side of neck toward ant side of neck, size 21 cm X 5 cm X visera deep injury to blood vessels, trachea oesophagus, food particles and blood stained fluid oozing from wound"

32. The learned Counsel has submitted that to convict an accused finger print exercise ought to have been done, which has not been done in this case. Mr.Raj, the learned Counsel for Sunil has submitted that the medical evidence cannot corroborate, if evidence of both eye witnesses is impeached.

33. Mr.Borulkar, the learned Public Prosecutor strongly defends the conviction of the above three accused and the imposition of death penalty on them with the following submissions:-

(a) The evidence of eye witnesses Dipa and Indira who were victims of serious injuries, is cogent, convincing, truthful and natural.

(b) Both the eye witnesses have truthfully deposed to whatever they had seen, and not artificially added

what they had not seen which they could have done, if they were to be untruthful.

(c) Evidence of both the eye witnesses with regard to injuries is clearly corroborated by the medical evidence. The prosecution case is fully supported by the dying declaration of Prabhu made to Shashindran.

(d) Reiterates the submissions made earlier with regard to the imposition of death penalty.

34. After hearing all the learned Counsel in this matter and after perusal of the evidence on record, the following sequence of events is clear. Between 1.15 to 1.30 a.m. when Krishnan woke up after hearing the knock, he turned on light and opened the back door, at that time, prosecution witness Deepa also got up and entered into that T.V.Room, and she saw all the three accused persons viz.Dilip, Manoj and Sunil and another unidentified person, all were armed with knives. Deepa saw accused Dilip and Manoj inflicting stab injuries on her father Krishnan’s stomach and chest. On seeing this, Deepa screamed. Then, Prabhu entered the room and tried to save his father Krishnan. Deepa saw accused Manoj and Dilip stabbing Prabhu on his stomach and chest. Deepa tried to save Prabhu. At that juncture, accused Dilip told Sunil and other person to take Prabhu outside and kill him. As Deepa was trying to save

Prabhu accused Dilip and Manoj rushed towards Deepa. In the meanwhile, Bijit came into the room and tried to restrain accused Manoj. Deepa states that accused Manoj inflicted knife wounds over the stomach and chest of Bijit, as a result of said wounds, Bijit fell to the ground. Thereafter, accused Dilip and Manoj came towards Deepa and inflicted kinfe blows on her stomach and other parts of the body. Deepa shouted and fell to the ground. Indira woke up and entered the room. Accused Dilip and Manoj rushed towards Indira and inflicted knife blows on her face and neck and both sides of her stomach and over other parts of the body, as a result Indira fell down. Thereafter immediately accused Sunil entered the room and the Abhayraj followed accused Sunil. Accused Sunil inflicted knife blows on the neck of the Abhayraj as seen by both Deepa and Indira. Abhayraj ran outside the room and accused Sunil went chasing him armed with the knife. Accused Manoj at this juncture dropped knife with which he had inflicted wounds. Thereafter accused Manoj and Dilip left the room. After a period of 15 minutes, Deepa somehow crawled towards the telephone and narrated the incident to Balan and she disconnected the call. After sometime, Indira went screaming to the front door and after opening the door she shouted Bachao, Bachao and the Prabhu who was lying in front of the door was screaming as Mummy, Mummy. Later on Deepa seems to have become unconscious.

35. The Prosecution has examined two injured eye-witnesses in the above case, with regard to the aforesaid four murders, viz. PW-4 Deepa & PW-8 Indira. Over and above, PW-1 viz.complainant Balan and the brother-in-law PW-2 Shashindran have also narrated the details as far as they knew. A clear analysis of the evidence of aforesaid four witnesses viz. PW-4 Deepa, PW-8 Indira, PW-1 Balan and PW-2 Shashindran shows the same to be cogent, consistant, true and reliable. The following comparison chart clearly establishes cogency, consistency and truthfulness in the evidence of all the aforesaid four witnesses.

COMPARISON CHART OF IMPORTANT WITNESSES WITH REGARD TO THEIR EVIDENCE

DIPA (PW4)	INDIRA (PW8)	BALAN (PW1)	SASHINDRAN (PW2)
Between 1.15 am and 1.30 am there was a knock at the back door			
Krishnan (father woke up and turned on the light			
Krishnan opened door			
Dipa came out into the TV Room			
Accused Dilip, Manoj Sunil and another unidentified person entered the room armed with knives			
Dilip and Manoj started stabbing			

Krishnan in the stomack and chest				
Dipa started screaming				
Prabhu came in room				
Prabhu intervened to save Krishnan. Dilip and Manoj stabbed him too in the stomach and chest				
Deepa tried to save Prabhu				
Dilip told Sunil and the other person to take Prabhu outside and kill him				
Dilip and Manoj rushed towards Dipa				
Bijit came out of the room and tried to restrain Manoj				
Manoj inflicted knives over stomach and chest of Bijit				
Bijit sustained injury and fell on the ground				
Dilip & Manoj came towards Dipa inflicting blows with knife on stomach and other parts of the body				
Dipa shouted and fell on the ground	Indira woke up			
Indira (mother) came the room	Indira came in the TV Room			
Dilip and Manoj rushed towards her	Dilip & Manoj rushed towards her			
Dilip & Manoj inflicted blows on the face, neck, both side of the stomach and other parts of the	Dilip & Manoj inflicted blows with a knife on the neck, face &			

body	chest			
Indira fell	Indira fell down			
Sunil entered the room	Accused Sunil came in the room			
Abahyraj followed	Abhayraj came in running			
Sunil inflicted blow with a knife on the Abhayraj’s neck	Sunil cut the neck of the Abhayraj			
Abhayraj ran outside the same door	Abhayraj ran outside from the back door			
Sunil chased Abhayraj armed with knife	Accused sunil chased Abhayraj with a knife			
Manoj dropped the knife (feeling Dipa may be unconscious)				
Manoj & Dilip left	Manoj & Dilip left			

After 15 mins.Dipa went towards the phone and narrated the incident to Balan		Dipa called Balan at 1.15 informing about the incident		
Dipa disconnected the call		Balan tried dialing 100 (police control) but was unable to get through		
Therefter Indira went crawling towards the door and opened it	Indira went towards the door crawling and opened it	Balan knocked on Shashindran’s door	Balan knocked the door and woke Shashindran up	
Indira screamed "bachav bachav"		Balan narrated the story to Shashindran	Balan narrated the entire story	

Prabhu screamed "Mummy Mummy"	Prabhu screamed "Mummy Mummy"	Balan asked Vasai Police station's number	Balan asked for Vasai Police station's number
	Prabhu gave a dying declaration to Indira that Dilip, Manoj,Sunil & one more person assaulted him with knife		Shashindran called up his brother & asked for the number
	Indira shouted for help "bachav bachav"		Shashindran called up vasai police station, they said that it fell under Manikpur jurisdiction
Dipa became unconscious	Indira, Dipa & Prabhu were taken to the hospital by the police	Balan called up Manikpur Police station	Balan called up Mainkpur Police station
	Indira became unconscious	No satisfactory reply from Manikpur Police station	They refused to lodge complaint & told them to lodge a complaint at Waliv
Dipa regained consciousness in the hospital	Indira regained consciousness about 15 days	Balan left from Andheri at 3.00 am for Waliv with Shashindran	Shashindran left at 3.00 am with Balan and his son Srijit
		Balan & Shashindran reached at 4.00 am.	Balan & Shashindra reached at 4.00 am.
		There was crowd in front of the house	There was crowd in front of the house
		Bijit's dead	Bijit's body in

		body was in front of the door of the house	front of the door in a pool of blood (corroborated with evidence of PW-10)
			Entered the entire floor was flooded with blood
		Krishnan’s body near the kitchen door	Krishnan’s body in front of the kitchen door
		Asked neighbours about Prabhu, Indira & Dipa	
		Balan & Shashindran went to Manikpur Police stn.	Balan & Shashindra went to Manikpur Police Stn.at 5.00 am
		Balan lodged a complaint	Balan lodged a complaint
		Balan & Shashindran went to the dispensary at vasai	Balan & Shashindra went to the Vasai Primary Health Centre.
			Prabhu, Dipa & Indira in the Hospital and had sustained injuries
		Balan saw Prabhu had sustained injuries over his chest & stomach.	Shashindran saw Prabhu has sustained injuries over his chest, stomach and over the ribs of right side and over his left hand
		Indira had sustained injuries over	Indira had injurie from her face upto the neck and her

		her neck chin, & cheek	left had palm
		Dipa had injuries over her lip, shoulder, waist & stomach	Dipa had injuries over her lips, shoulder and waist
		Balan stayed back	Shashindran carrie Prabhu, Dipa, Indira and one more person to Bhagwati hospital in ambulance
			Dipa and Indira were unconscious
			Prabhu disclosed me that Sushma's brother Dilip, Manoj, Sunil and one more person had inflicted blows with knife over Prabhu & his family members.

36. The prosecution has examined PW-5, PW-6 and PW-12 being the doctors who conducted the post-mortem on the above four deceased persons. We have also perused the Post-Mortem reports of all the above four deceased which are duly proved. The Post-Mortem reports as well as the evidence of the above doctors clearly corroborates the ocular evidence with regard to the injuries inflicted on the deceased persons. Over and above, the prosecution case is fully supported by the oral dying declaration of

Prabhu made to Shashindran.

37. In this case, the evidence of two eye-witnesses who themselves were victims of serious injuries due to the attack by the accused, is found to be totally reliable and the same is completely corroborrated by the medical evidence. If that be so, the evidence of two eye-witnesses clearly corroborrated by the medical evidence, is sufficient to convict the accused persons, as has been held by the Hon'ble Supreme Court in the case of -

(a) **Kartarey V/s.State of U.P. - (1976) 1 SCC 172**, wherein the observations in paragraph No.27 are relevant, which read as under:-

> "27. The length and breadth of wounds Nos.9 and 10 was 6 cm x 2 cm each, while those of wound No.7 were 6.5 cm x 2.5 cm. This dimension-wise classification of the injuries into three groups points with reasonable certainty to the conclusion that stabs Nos.1, 2, 3, 4, 5 and 15 were caused with one weapon, stabs Nos.6, 8, 11, 12, 13 and 16 with another and stabs Nos.7, 9 and 10 with a third. Thus the medical evidence lends valuable corroboration to the ocular account of the eye witnesses inasmuch as they say that these injuries on the deceased were inflicted by three persons, one with a chhura, Ex.P-1, and by the other two with Katars."

(b) **Ramjee Singh & Another V/s.State of Bihar - (2001) 9 SCC 528**, wherein the observations in Paragraph No.11 are very relevent, which read as under:-

"11. We have gone through the entire evidence. Even if we discard the evidence which has been discarded by the trial Court we find that PW4 in her testimony categorically stated that on hearing the screams of her daughter that her father was being assaulted, she ran out of her house and watched all the three accused causing injuries to the deceased. Although she has not attributed the specific injuries caused by each of the accused, she has named all the three accused and stated that all of them caused injuries. Submission for the learned Counsel for the appellants that no reliance could be placed on the testimony of Rajpati Devi, PW 4 as she being the wife of the deceased and there being a family dispute within the family, was an interested witness cannot be accepted. As the incident had taken place just near the house of the deceased and PW-4 was present at the house, she was a natural witness to the occurrence. She had also received injuries in the same occurrence and this fact was duly coroborated by the injury record and the evidence of PW-7 Dr.Nawal Kishore who examined her soon after the incident. She being the wife of the deceased there was no reason for her to leave the real culprits and implicate the accused persons falsely. The suggestions made in the cross-examination that the place of occurrence was different than the one which has been shown by the prosecution cannot be accepted. The suggestion put to PW-4 that her husband was caught while committing immoral act in the field is far-fetched and imaginary. There is nothing on the record to indicate that the occurrence did not take place at the place where it is alleged to have been placed."

(c) **K.S.Bhaskara Reddy V/s.G.A.Reddy - (1998) 9 SCC 504,**

wherein, the relevant observations of the Supreme Court in paragraph No.5 & 9 read as under:-

"5. From the judgment of the trial court, which runs through 120 pages, we find that after a detailed discussion of the entire evidence adduced by the parties, in the light of the diverse arguments canvassed on their behalf to establish their respective cases, it held that the evidence of PWs 1 to 4 was trustworthy and that the medical evidence fully corroborated their ocular version. The other reasons which weighed with it to accept the evidence of PW-1 and for that matter the prosecution case- were that the injuries found on

his person by PW-10 proved his presence at the time of the incident and that he lodged the FIR detailing the substratum of the prosecution case at the earliest available opportunity. In arriving at the above conclusions, the trial court observed that the entries in the hospital record on the basis of which DWs 4 & 5 testified were wholely unreliable; that the evidence adduced by the defence to prove that PW-4 was working in the rice mill at the material time was unacceptable; and that the report (Ext.D-12) sent by DW-1 did not in any way discredit the prosecution version as regards the place of incident."

"9. On a perusal of the record we are constrained to say that each of the reasons given by the High Court for recording the order of acquittal in favour of A-3 to A-6 is patently wrong. That apart, some of the observations made by the High Court in that regard stand contradicted by its other observations. For example, having observed that it was quite aware of the fact that PW-1 was severely injured and he might not have been in a mood to narrate the incident in great detail the High Court could not have expected of PW-1 nor was it necessary to give the graphic details of the rules played by each of the accused in the murder. While on this point it will be pertinent to refer to the statements made therein. After giving the background of the enmity between their family and that of the accused PW-1 stated that on 31.7.1992 at or about 5.00 p.m. when he, his father and coolies were in their field the six accused persons came there armed with knives and spears and suddenly attacked his father. A-1 hacked him with a knife on the head and A-2 with a spear on the neck and then the other accused assaulted him (the deceased) with knives and spears indiscriminately. This was followed by a statement as to the manner of assault on him by some of the accused. Lastly he stated that PW-2 witnessed the incident and PW-4 had brought him to the hospital. It would thus be seen that all the material facts relating to the incident find place in the FIR, and, therefore, the High Court was not at all justified in brushing aside the prosecution case regarding participation of A-3 to A-6 in the murder on the sole ground that the manner in which they actually assaulted the deceased was not mentioned therein. Absence of the names of A-3 and A-4 in the FIR should not also have been made one of the grounds to discard their evidence when it was specifically mentioned therein that coolies were worling with them in their field at the time of the assault (which necessarily meant that they were witnesses to the incident) and when admittedly PWs 3 and 4 work

as coolies. Incidently, it may be mentioned that the name of PW 4 does find place in the FIR (as noticed earlier) as the person who took PW 1 to the hospital."

(d) S.C.Ukabhai V/s.State of Gujrat - 1983 (2) SCC 174,

wherein the relevant observations of the Supreme Court in paragraph Nos.12 & 13 read as under:-

"12. In the opinion of the High Court it would not be proper to discard the testimony of eye-witnesses, if it was otherwise satisfactory, on the simple ground that the medical testimony was in conflict with the testimony of the witnesses, insofar as they depose to the injuries on the deceased having been caused by a spear."

"13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye-witnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

38. The contention of Mr.Ramakant Patil, the learned Counsel appearing for the original Accused No.1 - Dilip that the FIR lodged at 5.30 a.m. was a concocted FIR as Balan was not the eye witness, cannot be sustained. The entire incident was narrated to PW-1 Balan by PW-4 Deepa. Thereafter the Balan had visited the scene of offence and had spoken to Deepa and Prabhu etc. and thereafter the said complaint has been registered. The contention of the learned Counsel Mr.Ramakant Patil that a mere message

about some incident in that area received by PW-10 Shashikant Bhosale should not have been treated as FIR, cannot be accepted.

39. Mr.Ramakant Patil, the learned Counsel appearing for Accused No.1 Dilip also raised the issue that Abhayraj's body was found 300 ft.away from the residence and as such, the FIR and the prosecution story ought not to be believed. With regard to the above, the evidence led clearly establishes that the Abhayraj was attacked and chased by Sunil and ultimately after receiving several injuries Abhayraj seems to have ran away and collapsed around 300 ft away from the residence. Abhayraj being a young person must have obviously kept running after receiving knife injuries and he was being cahsed by the accused, and there is nothing unusual if his body is being found 300 ft away from the residence.

40. The plea of the learned Counsel Mr.Ramakant Patil that some unknown persons must have attacked all these six persons of whom four persons died since some buffaloes of deceased Krishnan might have damaged some fields, cannot be believed at all. There is absolutely no material for such a probability . Over and above, why injured witnesses Deepa and Indira should protect the real assailants and implicate Dilip and his associates. Even Prabhu's oral dying declaration supports the prosecution case.

41. Similarly, the contention of Mr.Sandesh Patil, the learned Counsel appearing on behalf of Accused No.3 - Manoj that the FIR was lodged belatedly, cannot be sustained. Mr.Patil submitted that there are a number of contradictions in the evidence of both the eye-witnesses viz.Deepa & Indira; and as such, the benefit of doubt ought to be given to Accused Manoj, cannot also be sustained since the evidence of both the eye-witnesses is cogent, convincing and truthful, as analysed hereinabove. Similarly, the contention of Mr.Sandesh Patil, the learned Counsel for the accused Manoj that the evidence of Shashindran ought not to be believed, is also unsustainable as his evidence is not unreliable. The objection raised by the learned Counsel Mr.Sandesh Patil that Deepa ought to have lodged the complaint, cannot also be sustained since Deepa was injured critically. By the time Balan had reached and he has given all the details by Deepa and the FIR was accordingly registered. At that time the police were also anxious to take Deepa, Prabhu and Indira to the Hospital to save their lives and hence they were rushed to the hospital. The contention of the learned Counsel Mr.Sandesh Patil that there were stitches on Deepa’s lips and hence recording of Deepa’s statement is doubtful, cannot also be sustained since stitches were only in the corner of the lips, right upper lip and right lower lip.

42. Though the learned Counsel Mr.Sandesh Patil has also raised objection that there were serious contradictions in PW-8 Indira's evidence, we however find no serious contradictions on material aspects and that there are no material improvements also. Though it was contended by the learned Counsel Mr.Sandesh Patil that Deepa had not stated before the Police that all the accused were armed with knives, there is however no dispute that Deepa had described the actual sequence of attack with knives, and hence such an omission on her part wound not be a serious omission since Deepa in her subsequent statement recorded before the police has clearly stated that all the accused had used knives while inflicting the blows. Even not mentioning Manoj and Sunil as "friends of Dilip" is not a serious omission, as she has clearly mentioned their names. Mr.Sandesh Patil's objection regarding non conducting of identification parade cannot be sustained, as there is no flaw since prosecution witnesses Deepa and Indira knew Manoj Paswan by name. Even Mr.Patil's objection that the motive was not established, cannot be sustained especially in view of the evidence of Sushma, being the sister of Dilip.

43. Mr.Sandesh Patil, the learned Counsel for the Accused Manoj has also raised an issue that the clothes of the accused Manoj were not sent to the Chemical Analyser and that there was no report of the Chemical Analyser with regard to the knife. It may be noted here

that this case is not based solely on circumstantial evidence and it is based on a clear evidence of two reliable and truthful eye-witnesses and fully corroborrated by the medical evidence and also the oral dying declaration of Prabhu, and hence the objections raised by the learned Counsel Mr.Sandesh Patil cannot be sustained.

44. Mr.Raj, the learned Counsel appearing on behalf of the original accused No.2 - Sunil Yadav has sought to contend that the omissions of the names of accused Manoj Paswan and Sunil Yadav by Balan in the FIR, tantamounts to contradiction. It is to be noted here that Balan was not knowing Manoj Paswan and Sunil Yadav personally whereas he was aware of Dilip as Dilip being the brother of Sushma who had married with his relative Prabhu, and as such, their names are not mentioned in the FIR. However, he has categorically stated that Dilip alongwith his friends had attacked. Balan was not an eye-witness to the incident hence his omission to mention the names of the accused Manoj and Sunil would not be fatal to the prosecution. The Supreme Court Judgments referred to by Mr.Raj in that behalf are all eye witnesses lodging an FIR cannot omit to mention the names, otherwise it will be fatal. As Balan was not an eye witness, hence omission to mention the names of Manoj and Sunil would not be fatal.

. The contention of Mr.Raj, the learned Counsel appearing on behalf of Accused Sunil Yadav that the motive behind the crime has not been established, also cannot be accepted as the sequence of events clearly show that accused Dilip was harbouring discontent and revenge as his sister Sushma had married with Prabhu who was belonging to a very low caste. The evidence clearly indicates that Dilip had repeatedly opposed very strongly to the marriage of his sister with Prabhu.

. The learned Counsel Mr.Raj's contention that Deepa had not stated before PSI Barve that accused Sunil and Manoj were Dilip's friends, would not affect the case of the prosecution as Deepa had categorically mentioned their names. The failure on the part of Deepa to mention that they were friends, wound not also change the complexion of the case as she had seen & identified all the three accused persons and one more unidentified person, and therefore, the contention of the learned Counsel Mr.Raj that the evidence of Deepa was untruthful & unreliable, cannot also be sustained.

. Though it is the contention of the learned Cousnel Mr.Raj about the evidence of Shashidharan that there was no mention of knife being used for inflicting blows, we would like to mention here that Shashidharan was not the eye-witness to the incident and as such his failure to mention knife would not be fatal to the prosecution case.

Both the eye-witnesses have categorically mentioned of knives being used for inflicting the injuries. Even the contention of the learned Counsel Mr.Raj with regard to the evidence of Balan giving more details which are not found in the FIR, also has no substance since the FIR contains basic details and obviously in the evidence based on the questions further details have been given. Balan not mentioning about telling all details to Shashindran and Sushma is not serious infirmity since FIR will contain only all relevant and basic details. Shashindran's evidence also cannot be faulted similarly.

. The learned Counsel Mr.Raj has also raised an issue that Indira was not mentally stable while she deposed and as such, she was icompetent to depose. His objection was that the Court ought to have verified whether she was mentally fit to depose. From the evidence of Indira however one does not find any mental disability. There is nothing incoherent in her evidence and as such, the learned Sessions Judge was not required to get her medically examined before she deposed. Mr.Raj's objection regarding Indira not mentioning about the knocking of door and entering of four persons, is not a flaw, as she came in later. Various other minor flaws pointed out are not of much consequence.

. The objections of the learned Counsel Mr.Raj with regard to certain contradictions and improvements with

regard to the evidence of the investigationg officer, cannot be sustained, and none of them are very material in nature. Even the objection of the learned Counsel Mr.Raj with regard to the arrest panchanama being not recorded properly, will have no much consequence as there is no dispute that his client was arrested and later on tried for the aforesaid offence.

. The learned Counsel’s objection regarding non examination of one neighbour Dipa Yashwant Kakad, has no substance, as she had only seen Indira wearing a maxi soaked with blood just outside the house. There is no dispute that she went out of the door shouting "Bachao, Bachao".

. Similarly, even the delay of 16 days in recording Indira’s statement cannot be faulted, as Medical Officer had clearly opined that she was not fit to make a statement.

. Mr.Raj is right that Court should not mechanically follow the evidence of the prosecution, but in the instant case, after a detailed analysis as pointed out hereinabove, the guilt is clearly established.

. The doctor’s statement that the injury on Abhayraj could be caused by knife, sickle or sword, will be of no assistance to Sunil, as all the three accused including

Sunil were carrying knives.

. Even the evidence of two witnesses led by way of defence by Sunil will be of no help, as they deal with the alleged discrepancy in the time of arrest of Sunil.

. Hence we do not find any ground made out by Mr.Raj to give the benefit of doubt to Sunil.

45. Under the aforesaid facts and circumstances, after taking into account the entire evidence, submissions of all the learned Counsel for the Accused and the learned Public Prosecutor, we find the following:-

a) The evidence of eye witnesses Deepa and Indira who were victims of serious injuries, is cogent, convincing, truthful, reliable and natural.

b) Both the eye witnesses have truthfully deposed to whatever they had seen and not artificially added what they had not seen, which they could have done if they were to be untruthful.

c) Eye witness account of both the witnesses sound very natural.

d) There is absolutely no reason as to why both the seriously injured eye witnesses Deepa and Indira would

falsely implicate Dilip and his associates and let off the real culprits.

e) Evidence of both the eye witnesses with regard to the injuries is clearly corroborated by medical evidence.

f) The prosecution case is fully supported by the oral dying declaration of Prabhu.

46. In the above case, common intention, especially pre-concert and meeting of mind is very clear, since all the three accused came to the house of Krishnan at 1.15 a.m. together. When the door was opened, they all entered the house with knives in their hands, and with military precision killed four persons and seriously injured two.

47. Evidence of Dipa and Indira, injured witnesses and the medical evidence clearly corroborates the offence of attempt to murder punishable u/s.307 read with Sec.34 of the Indian Penal Code. Evidence clearly establishes the guilt of Dilip and Manoj with regard to the above offence of attempt to murder Dipa. Similarly, the evidence of Indira and Dipa alongwith medical evidence clearly establishes the offence of attempt to murder Indira by both Dilip and Manoj, and hence Dilip & Manoj are guilty u/s.307 read with Sec.34 of the Indian Penal Code.

48. From the evidence of injured witnesses Dipa and Indira, corroborated by the medical evidence, accused Dilip, Manoj & Sunil are guilty of the offence of criminal tresspass with common intention committed house tresspass by entering into and thereafter unlawfully remained in the dwelling house of Krishnan, by making preparation and causing hurt to all the four deceased and to Dipa and Indira by deadly weapons like knives, punishable under Section 452 read with Sec.34 of the Indian Penal Code.

49. Applying the principles laid down in various judgments of the Supreme Court as mentioned hereinabove, and after giving a deep consideration with regard to imposition of death penalty, after taking into account the mitigating factor of lack of criminal antecedents, however young age is not a mitigating factor, and taking into account the following aggravating circumstances:-

(a) Helpless victims;

(b) Victims totally unarmed;

(c) Victims woken up from sleep at midnight;

(d) Manner of inflicting injuries, 20-30 serious injuries on each of the deceased, whereas even a single injury would have been sufficient to kill, shows the barbarous attitude;

(e) Attacking ruthlessly six persons, Deepa & Indira were let off presumed to be dead, seeking to wipe off the entire family;

(f) Attacked on every vital organ;

(g) Young boy Bijit was brutally assaulted;

(h) Not only Prabhu, even the messenger boy Abhayraj was brutally assaulted;

(i) The time chosen was past midnight hence clearly premeditated;

(j) Assault on lower caste based on caste hatred;

(k) Marriage took place on 29.10.2003 and the assault was on 17.5.2004, i.e.after a lapse of seven months. As Dilip was totally opposed to the marriage, the above attack was highly pre-meditated and not at the heat of the moment;

we are clearly of the view that Dilip, Manoj and Sunil deserve to be imposed Death Penalty.

50. Hence we find Dilip and Manoj guilty of causing the murder of Krishnan, Prabhu and Bijit, punishable under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code.

51. Similarly, we find Sunil guilty of causing the murder of Abhayraj, punishable under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code.

52. We concur with the Trial Court judgment to the above extent. We also concur with the Trial Court with regard to imposition of Death Penalty on Dilip Tiwari, Manoj Paswan and Sunil Yadav and confirm the Death Penalty imposed of them. Hence, the following order:-

ORDER

1. Accused Dilip, Sunil and Manoj are convicted vide Section 235(2) of Cr.P.C. for the offence punishable under Section 302 r/w.Section 34 of the Indian Penal Code and they are sentenced to death.

2. Accused Dilip and Manoj are also convicted for the offence punishable under Section 307 r/w.Section 34 of the Indian Penal Code and are sentenced to suffer Rigorous Imprisonment for ten years and to pay a fine of Rs.5000/- each (Rs.Five Thousand Each), in default to suffer further Rigorous Imprisonment for five months each.

3. Accused Dilip, Sunil and Manoj are also convicted for offence punishable under Section 452 r/w.Section 34 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for three years and to pay a fine of Rs.1000/- each (Rs.One Thousand each), in default to suffer further Rigorous Imprisonment for one month each.

4. Sentences of imprisonment to run concurrently.

5. Accused Dilip is in Jail since 29.05.2004, Accused Sunil is in Jail since 02.06.2004 and Accused Manoj is in Jail since 22.06.2004. Set off is given for that period as per Section 428 of the Cr.P.C.

6. Death Sentences imposed on Dilip, Manoj and Sunil are confirmed.

53. Both the Criminal Appeals viz.Criminal Appeal No.1086 of 2006 & the Criminal Appeal No.156 of 2007 stand dismissed, and the Confirmation Case No.2 of 2007 stands allowed.

(SMT.R.S.DALVI,J.) **(DR.S.RADHAKRISHNAN, J.)**